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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

THE MEAD CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF *AMICUS CURIAE* OF PROFESSOR THOMAS W. MERRILL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF PROFESSOR THOMAS W. MERRILL IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amicus curiae is a Professor of Law who has devoted much of his professional life to practicing, teaching, and writing about administrative law.[1] His scholarly interests in this regard have

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[1] Pursuant to S. Ct. R. 37.6, *amicus curiae* states that no person or entity, other than *amicus curiae*, has authored this brief, nor has any other person or entity made a monetary contribution towards its preparation or submission. Consent letters from counsel for each party have been lodged with the Clerk.

centered on when courts should give deference to administrative interpretations of statutes and in particular on seeking to understand the appropriate rationale and scope of the doctrines articulated in this Court's decisions in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).[2] This brief is submitted in the hope that it will assist the Court in its deliberations in considering the important issues presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's petition for certiorari in this case asks for deference to an interpretation, set forth in tariff classification rulings of the Customs Service, of the terms "diaries" and "bound" as they appear in statutory tariff schedules. The government's petition, however, does not distinguish between mandatory deference to agency interpretations of statutes, recognized in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and discretionary deference, associated with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). After the petition was filed, but before it was granted, this Court decided *Christensen v. Harris County*, 120 S. Ct. 1655 (2000). Although the majority in *Christensen* reaffirmed the distinction between *Chevron* deference and *Skidmore* deference, concurring and dissenting opinions expressed conflicting views about the relationship between these two important doctrines. This case presents an appropriate opportunity for the Court to provide additional

[2] *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U.L.Q. 351 (1994); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI-KENT L. REV. 1039 (1997).

clarification about the rationale and scope of *Chevron* and *Skidmore*.

Christensen correctly perceived that *Chevron* and *Skidmore* are fundamentally different. *Chevron* is rooted in an implied delegation of interpretational authority from Congress to the agency, based on the delegation of power to act with the force of law. Because it rests on a congressional command, *Chevron* deference is mandatory where it applies. *Skidmore*, in contrast, is grounded not in a command of Congress but rather in judicial recognition of the desirability of synchronizing judicial and administrative understandings of law. *Skidmore* requires courts to consider a variety factors associated with an agency's interpretation, such as the thoroughness of its reasoning, its consistency over time, and the agency's expertise, before deciding how much weight the interpretation should be given in any context. The two doctrines perform complementary functions, and the legal system is stronger for having both doctrines than it would be if it were limited to either one or the other.

The Court has said little about which agencies are entitled to *Chevron* deference, beyond stating that they are agencies that Congress has "charged with administering" a statute. Nearly all executive units can be said to "administer" one or more statutes, however, if only in determining how to spend money or when to bring enforcement actions. A more accurate statement of the type of delegation of power that should give rise to an inference of delegated interpretational authority is that Congress has given the agency the power to bind persons outside the agency with the force of law. *See Christensen*, 120 S. Ct. at 1662. Congress must always expressly delegate the power to bind with the force of law; it cannot arise by implication. In giving the agency such power, Congress necessarily recognizes that the agency will have the final say about the meaning of law, at least

in cases where no judicial review is sought or is available. And this criterion also yields conclusions that seem to be broadly correct: agencies that are given power to prescribe legislative rules or render binding adjudications would be eligible for *Chevron* deference; agencies that do no more than award grants or initiate prosecutions would not be.

Once we determine that an agency is *Chevron*-qualified, it is equally important to follow the logic of implied delegation in identifying which types of agency interpretations are entitled to mandatory deference. Just as a delegation of power to act with the force of law in one way (say by legislative rulemaking) would not give rise to an inference that the agency has been delegated power to act with the force of law in another way (say through adjudication), so a derivative delegation of interpretational authority based on one type of primary delegation (say legislative rulemaking) should not give rise to an inference that the agency has been derivatively delegated authority to interpret in other procedural formats (say through policy statements or agency manuals).

This conclusion is reinforced by process concerns. When an agency acts in ways that bind with the force of law, affected parties have the right to participate in the development of the interpretation (under Section 553 of the Administrative Procedure Act in the case of legislative rulemaking; under APA Sections 556 and 557 or because of due process in the case of binding adjudication). Affording *Chevron* deference to agency interpretations rendered in more informal procedural formats would deprive interested persons of these participation rights, and would create an avenue for their evasion.

It follows that the dispositive question here in determining whether *Chevron* or *Skidmore* applies to tariff classification rulings is whether they are legally binding on persons outside

the Customs Service. Because the regulation that authorizes these rulings makes them binding only on agency personnel, and because these rulings are not promulgated in accordance with the notice-and-comment procedures of Section 553, tariff classification rulings should be regarded as interpretative rules, rather than legislative rules. Accordingly, the appropriate standard of deference is that delineated in *Skidmore*, not *Chevron*.

ARGUMENT

I. *CHEVRON* AND *SKIDMORE* REFLECT ALTERNATIVE DEFERENCE DOCTRINES, EACH OF WHICH PLAYS AN IMPORTANT ROLE IN ADMINISTRATIVE LAW

Last Term's decision in *Christensen* revealed divergent views among the Justices about the relationship between the Court's two leading precedents on judicial deference to agency interpretations of statutes – *Chevron* and *Skidmore*. Writing for a majority of five, Justice Thomas reasoned that an interpretation of the Fair Labor Standards Act contained in an opinion letter issued by the Department of Labor's Wage and Hour Division was not entitled to deference under *Chevron*. The majority distinguished between interpretations set forth in agency actions that have "the force of law" – specifically, those adopted through notice-and-comment rulemaking and formal adjudication – and interpretations contained in agency actions that do not have the force of law – such as opinion letters, policy statements, agency manuals, and enforcement guidelines. *Christensen*, 120 S. Ct. at 1662. Only interpretations having the force of law, the majority reasoned, are eligible for *Chevron* deference. *Id.* Interpretations that lack the force of law, such as an opinion letter, should be assessed under the discretionary

deference standard set forth in *Skidmore*, according to which agency interpretations are entitled to deference only insofar as they have "power to persuade." *Id.* at 1663.

Four Justices disagreed with the Court's understanding of the two deference doctrines. Justice Scalia argued that "*Skidmore* deference to authoritative agency views is an anachronism," brought to an end by *Chevron*. *Id.* at 1664 (Scalia, J., concurring). In his view, the only questions to be answered in determining whether *Chevron* applies are whether (1) the statute is ambiguous, (2) agency personnel responsible for administering the statute have interpreted the statute, and (3) the interpretation is "authoritative," in the sense that it represents the "official position of the agency." *Id.* at 1664 n.*. As Justice Scalia saw it, the interpretation in the opinion letter was authoritative, because it was signed by the Administrator of the Wage and Hour Division and the Solicitor General's *amicus curiae* brief on behalf of the Department of Labor had vouched that it was endorsed by the Secretary of Labor. Thus, the interpretation should have been assessed under the framework established in *Chevron*. *Id.* at 1665.[3]

Justice Breyer, dissenting on behalf of himself and Justices Ginsburg and Stevens,[4] offered a third view of the relationship between *Chevron* and *Skidmore*. Justice Breyer appeared to agree with Justice Scalia that the opinion letter was "authoritative," and for this reason was entitled to *Chevron* deference. *Id.* at 1667 (Breyer, J., dissenting). But he disagreed

[3] In extra-judicial writing, Justice Scalia has been a proponent of a broad application of the *Chevron* doctrine. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

[4] Although Justice Stevens did not formally join the Breyer dissent, he stated in a footnote to his own dissent "that I fully agree with Justice Breyer's comments on [*Chevron*]." *Id.* at 1667 n.2.

with the notion that *Skidmore* deference is an "anachronism." According to Justice Breyer, the majority appropriately relied on *Skidmore*, since *Chevron* had made "no relevant change" in the deference doctrine articulated in *Skidmore*. *Id.* *Chevron* had simply offered "an additional, separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations." *Id.* at 1667-68. Justice Breyer thus suggested that both *Chevron* and *Skidmore* were applicable and that both supported affirmance of the agency interpretation. *Id.* at 1668.[5]

The opinions in *Christensen* reveal a fundamental cleavage of views about the relationship between *Chevron* deference and *Skidmore* deference. Five Justices (the five joining Justice Thomas's majority opinion) recognize two deference doctrines, *i.e.*, *Chevron* and *Skidmore*, and believe these doctrines have distinct rationales and apply over different domains. Four Justices, in contrast, appear to be of the view that there is only one deference doctrine. Justice Scalia believes *Chevron* is the sole deference doctrine today, and that *Skidmore* deference is an "anachronism." Justice Breyer, joined on this point by Justices Ginsburg and Stevens, also appears to believe there is essentially only one deference doctrine, of which *Chevron* and *Skidmore* are simply separate manifestations.

The majority view in *Christensen* is correct both as a matter of precedent and policy, and it should be reaffirmed. The Court has on a number of occasions in the post-*Chevron* era recognized the continued existence of *Skidmore* deference as a doctrine distinct from *Chevron*. *See, e.g.*, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-58 (1991) (assessing

[5] Justice Breyer, in extra-judicial writing, has been critical of aspects of the *Chevron* doctrine. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-382 (1986).

interpretation adopted by the Equal Employment Opportunity Commission under *Skidmore* rather than *Chevron*, on the ground that the Commission lacks substantive rulemaking authority); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (reserving question whether administrative interpretation of the Rehabilitation Act, which is enforced by multiple agencies, is entitled to *Chevron* deference, but affording that interpretation deference under *Skidmore*); *see also Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136, 137-38 n.9 (1997); *Reno v. Koray*, 515 U.S. 50, 61 (1995); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 157 (1991). *Christensen*'s conclusion that *Skidmore* remains a viable legal doctrine after *Chevron* thus reflects the well-established view of the Court.

This understanding is also surely correct. *Chevron* and *Skidmore* rest on different rationales for affording deference to executive branch interpretations of ambiguous statutes. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see Chevron*, 467 U.S. at 843-44 (deference rests on either express or implied delegation of power to agency). This delegation, in turn, creates a presumption that Congress intended the agency, rather than the courts, to exercise primary interpretative authority under the statute. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (*Chevron* rests on the "presumption" that Congress meant for the agency to "possess whatever degree of discretion" statutory ambiguity allows); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479 n.14 (1997) (*Chevron* deference "arises out of background assumptions of congressional intent").

Under *Skidmore*, in contrast, no particular delegation of power to the agency is required before it is entitled to deference.

Justice Jackson, writing for the Court, acknowledged that Congress in that case had not delegated to any administrative agency responsibility "to determine in the first instance whether particular cases fall within or without the Act." 323 U.S. at 137. Deference under *Skidmore* is grounded not on delegated power but rather on the desirability of drawing upon the "specialized experience and broader investigations and information" available to the agency, *id.* at 139, and on the need to preserve uniformity between administrative and judicial understandings of the requirements of a national program. *Id.* at 140.[6]

Given this critical difference in the legal underpinnings of *Chevron* and *Skidmore*, the doctrines impose different degrees of constraint on the courts. *Chevron* deference, when it applies, is mandatory, in the sense that the courts must accept any agency interpretation that is consistent with the statute and is otherwise "permissible" or "reasonable." 467 U.S. at 844 (reasonable agency interpretation is given "controlling weight"). *Skidmore* deference, in contrast, rests in the sound discretion of the court. Agency interpretations under *Skidmore* are "not controlling upon the courts by reason of their authority," but rather are entitled to weight insofar as they have the "power to persuade." 323 U.S. at 140.[7]

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[6] *Chevron* relied in part on similar factors. *See* 467 U.S. at 865. But it did so in support of the conclusion that *Congress* intended to delegate primary interpretational authority to the agency, not to buttress a claim that *the Court* found the agency's decision persuasive as an exercise in interpretation. *Id.* at 865-66.

[7] One could say that *Chevron* reflects a doctrine of "statutory" deference, whereas *Skidmore* recognizes a doctrine of "common law" deference. *Cf.* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189-207 (1998) (contrasting "statutory" and "common law" versions of the *Chevron* doctrine).

Because it rests on a command from Congress, *Chevron* deference is an all-or-nothing proposition. Either the court finds that the agency has been given primary authority to interpret a statute, in which case the agency's interpretation controls if it is reasonable, or the court finds that the answer is clear at step one, and hence must be resolved by the court *de novo*. *Skidmore*, on the other hand, views deference to agency interpretations as falling along a sliding scale. Agency interpretations get various degrees of deference, ranging from none to slight to great, depending on the court's assessment of the strength of the agency's interpretation under consideration.

Finally, *Skidmore* makes deference turn on various contextual factors surrounding the agency's interpretation, such as its thoroughness, its logic, its consistency with prior interpretations, whether it has been ratified by Congress, and the degree of expertise the agency brings to the issue. These context-specific factors play little if any role under *Chevron*. The factors cited by *Skidmore* play no role under *Chevron*'s step one, where the inquiry focuses on whether Congress has directly spoken to the issue in question. 467 U.S. at 842-43. *Skidmore*'s "persuasion" factors are relevant at most under step two of *Chevron*, but even here they appear to play a greatly diminished role. Indeed, the Court has on several occasions reaffirmed that the *Chevron* framework permits agencies to change their interpretations of statutes, provided they give adequate explanations for their revised views. *See, e.g.*, *Smiley*, 517 U.S. at 742; *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991); *Chevron*, 467 U.S. at 863-64. This is at odds with the *Skidmore* factors, which give longstanding and consistent agency interpretations greater deference than recent and fluctuating views.

Of course, there is no point in having two deference doctrines if one will do. But *Chevron* and *Skidmore* require

distinctly different inquiries and operate over a different range of issues. Moreover, it is valuable to have a doctrine of discretionary deference like *Skidmore* available as an alternative to the mandatory deference doctrine of *Chevron*.

The virtue of having two deference doctrines can be seen most clearly if (as *Christensen* suggests) *Chevron* is properly confined to a relatively narrow domain defined by the agency's exercise of power to bind persons outside the agency with the force of law. If *Chevron* deference were limited in this fashion and no other deference doctrine existed, then there would be no basis for courts to draw upon the accumulated experience of agencies in resolving interpretational questions where the agency has not spoken with the force of binding law. It would be mandatory deference or nothing.

This makes little sense. Interpreters in a variety of contexts draw upon the views of other interpretative bodies, especially when those views are well-reasoned, reflect some type of comparative advantage (such as technical expertise or greater familiarity with the legal background), have been relied upon, or have been implicitly ratified by the legislature.[8] These are precisely the types factors that *Skidmore* indicated are relevant to whether courts should defer to agency interpretations. *See* 323 U.S. at 140. Declaring *Chevron* the exclusive basis for deference would impoverish statutory interpretation by cutting courts off from considering these sources of authority, with no good justification.

A more subtle danger of having just one doctrine is that it would lead to overapplication and hence dilution of *Chevron*. Much of the debate over the scope of the *Chevron* doctrine has

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[8] *See* Merrill, *supra* note 2, 101 YALE L.J. at 1003-12 (comparing the practice of deferring to executive interpretations with the practice of deferring to legal interpretations by parallel judicial systems).

been framed as if the choice is between *Chevron* deference and no deference at all. If this were indeed the choice, then defining *Chevron*'s scope broadly would make sense for all the normative reasons articulated not only in *Chevron* but *Skidmore* as well. But *Chevron* deference is strong medicine. If, in an effort to draw upon the benefits of deference, *Chevron* were extended to any agency that has some administrative function under a statute, or to any agency interpretation of that statute no matter how informal, this would likely be perceived as forcing courts to accept agency interpretations in circumstances where such deference is inappropriate, perhaps because the interpretation was rendered without any public input or without sufficient agency deliberation. This perception, in turn, could create pressure to develop "escape valves," most likely in the form of a greatly expanded conception of the judicial role at step one. Thus, if *Chevron* were the only basis for deference, the doctrine could become very broad but very riddled with exceptions.

Recognizing two deference doctrines significantly removes the pressure to expand and then to evade mandatory deference under *Chevron*. With two doctrines, the scope of mandatory *Chevron* deference can remain relatively narrow, since many of the benefits of deference can also be obtained under the discretionary, fall-back doctrine of *Skidmore*. And if the domain of *Chevron* remains compact and centered on those circumstances in which deference is most clearly appropriate, there will be significantly less pressure to devise escape valves from mandatory deference. Hence, *Chevron* can remain undiluted.

The more difficult question is whether *Skidmore* should be the sole rubric for resolving questions of deference, as Justice Breyer appeared to suggest in his *Christensen* dissent. Discretionary deference also has its drawbacks, however.

Because discretionary deference relies upon a multi-factoral standard, it is difficult to reach agreement among courts about the degree of deference to which agency decisions are entitled. The outcome of judicial review is thus more uncertain, and this could promote additional litigation, if only for purposes of strategic delay. The judgmental nature of the inquiry also means that judicial review of questions of law would be confined largely to the courts of appeals, rather than the Supreme Court. This in turn means that it might be more difficult to secure uniformity in federal regulatory law.

In short, a mixed regime – one that deploys both mandatory and discretionary deference – is probably superior to either type of pure regime. Mandatory deference, especially if identified by relatively bright-line triggering conditions, can reduce uncertainty, eliminate incentives for strategic litigation, promote uniformity, and facilitate supervision of the lower federal courts by the Supreme Court. If the sphere of mandatory deference is closely congruent with the set of circumstances in which such deference is appropriate – a very big if – then a domain a mandatory deference complemented by a residual rule of discretionary deference may well be superior to a regime of pure discretionary deference.[9]

Recognizing that there are two deference doctrines also has important implications for the most general question presented by this case – the scope of the *Chevron* doctrine. This Court has in effect recognized three options rather than two in

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[9] The argument is similar to the case for having both *per se* rules and a rule of reason in antitrust law, *see* 7 PHILLIP E. AREEDA, ANTITRUST LAW 361-64 (1986), or having categorical rules and balancing tests under the First Amendment, *see* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975), or indeed for having a mix of rules and standards in law more generally.

reviewing agency interpretations of statutes. Instead of deference and versus no deference, we have mandatory deference, discretionary deference, and no deference. This larger menu of options allows *Chevron* to be given a relatively narrow domain, one that captures those circumstances in which mandatory deference is most appropriate. *Skidmore* then steps into the breach and allows courts to give discretionary deference to agency interpretations outside the core area where *Chevron* holds sway. In those areas where *de novo* judicial interpretation of the law is desirable – for example in interpreting general statutes like the APA – then obviously neither *Chevron* nor *Skidmore* should apply.

II. WHICH AGENCIES, AND WHAT KINDS OF AGENCY DECISIONS, ARE ENTITLED TO *CHEVRON* DEFERENCE?

This Court has had relatively little to say about which agencies are entitled to *Chevron* deference, beyond observing that *Chevron* applies when an agency has been "charged with administering" a statute by Congress. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1314 (2000); *Smiley*, 517 U.S. at 739; *Chevron*, 467 U.S. at 844, 865. The Court has also offered little guidance about what kinds of agency decisions are entitled to *Chevron* deference, once the agency has been appropriately "charged." The most authoritative statement here is that of *Christensen*, which identifies "formal adjudication and notice-and-comment rulemaking" as being the kinds of action entitled to *Chevron* deference, while indicating that agency interpretations that lack "the force of law," such as "interpretations contained in policy statements, agency manuals, and enforcement guidelines," "do not warrant *Chevron*-style deference." *Christensen*, 120 S. Ct. at 1662; *see also Metropolitan Stevedore Co.*, 521 U.S. at 137-38 n.9 (1997) (suggesting that *Chevron* deference applies to

interpretations "embodied in any regulation or similar binding pronouncement").

The question of what kinds of agency interpretations are entitled to *Chevron* deference cannot be answered without first understanding why some agencies are eligible for *Chevron* deference and some are not. In other words, it is necessary to determine what it means for an agency to be "charged with administering" a statute before we can identify those types of agency pronouncements that should be afforded mandatory deference by courts.

A. Agencies Empowered To Act with Force of Law.

Although the Court has not defined what it means for an agency to be "charged with administering" a statute, a few benchmarks have been established along the way. First, it is clear that an agency given a specific grant of rulemaking authority to interpret a particular statutory provision or to fill a specific statutory gap is an agency that has been charged with administration of the statutory provision in question. *See Chevron*, 467 U.S. at 843-44; *cf. Batterton v. Francis*, 432 U.S. 416, 424-26 (1977). Similarly, an agency that has been delegated a general power to implement a statute through legislative rulemaking is one that has been appropriately charged with administration of the statute for purposes of *Chevron*. *See United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (agency given authority "to prescribe legislative rules" entitled to *Chevron* deference). On the other hand, a statutory provision that is enforced in an original judicial action is not one that the agency is "charged with administering"; the administrator here is the court. *Adams Fruit*, 494 U.S. at 649-50. And a statute that applies to all agencies, such as the APA, is not one that any particular agency is charged with

administering. *Metropolitan Stevedore Co.*, 521 U.S. at 137 n.9.

In light of these benchmarks, and *Chevron*'s foundation in the concept of delegation of powers, *Christensen* correctly identified the power to bind persons outside the agency with the "force of law" as the defining characteristic of agencies entitled to *Chevron* deference. *Christensen*, 120 S. Ct. at 1662. There are several mutually reinforcing reasons for focusing on the power to act with the force of law as the key variable in determining which agencies are entitled to mandatory deference.

First, asking whether the agency has authority act with the force of law poses a question that will always have an answer – yes or no – and serves as a meaningful basis for distinguishing agencies "charged with administering" a statute from run-of-the-mill executive units. All administrative units have certain powers inherent in their status as components of the executive branch. All executive offices have inherent authority to interpret the law when this is necessary in the performance of their functions,[10] and all executive units have authority to bind subordinate employees to instructions issued by the head of the office.[11] Given these inherent powers, virtually all units in the executive branch will occasionally render official interpretations of statutes binding on subordinate employees but not on persons outside the agency. These sorts of powers do not

[10] *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1262, 1279-88 (1996); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46, 70-71 (1993).

[11] *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593-99 (1994).

distinguish agencies "charged with administering" a statute from virtually any governmental entity.

In contrast, the authority to bind actors outside the agency with the force of law is something which Congress must always explicitly confer. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes."). Only a subset of agencies are given such power, and when they are, it is usually with respect to a delimited set of issues. This understanding – that agencies can bind persons with the force of law only pursuant to an express delegation of authority from Congress – has its roots, of course, in the nondelegation doctrine. *See id.* If there were any doubt about the matter, it is resolved by Section 558(b) of the APA, which provides:

> A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

5 U.S.C. § 558(b). Thus, in asking whether Congress has conferred power on an agency to act with the force of law, we are asking a question that readily differentiates some agencies (and some issues resolved by agencies) from other agencies.[12]

[12] This Court has occasionally suggested, most notably in *Chevron* itself, that the relevant delegation of power comes about when Congress enacts a statute that contains a gap or ambiguity. *See Chevron*, 467 U.S. at 843-44. But this cannot be correct. Any statute that entails executive branch enforcement can (and most likely does) contain gaps and ambiguities. Thus, this factor does not differentiate agencies charged with administration of statutes from other agencies. Gaps and ambiguities are relevant because every delegation of power to an agency is subject to the constraint that it must be exercised in

Second, there is a certain logic to making the power to act with the force of law the linchpin in determining whether there has been "an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 120 S. Ct. at 1314. When Congress enacts a statute that confers power on an agency to implement the statute in a way that legally binds persons outside the agency, Congress should expect that in a significant percentage of cases the agency view as to the meaning of any gap or ambiguity in the statute will prevail – it will become the law of the land. The decision to confer powers on an agency to make legally binding decisions thus represents a choice by Congress to confer the primary power of interpretation on the agency.

One cannot attribute the opposite expectation to Congress – that courts will do the gap-filling – even though Congress provides that the agency's rules will be subject to judicial review under the APA and the APA authorizes courts "to decide all relevant questions of law." 5 U.S.C. § 706. It may be that no court will ever be asked to review one of the agency's rules, or if asked, will ever reach the merits. Because the agency will necessarily become the primary interpreter by default where no judicial review takes place, it makes sense, if only in terms of preserving uniformity, to make the agency the primary interpreter in all cases.

Third, a decision to give an agency the power to act with the force of law is not likely to be undertaken without due

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accordance with law. Thus, whether an agency is acting pursuant to an express delegation of interpretational power, or pursuant to an implied delegation of interpretational power, its interpretation must fill a gap or ambiguity. If there is no gap or ambiguity, then there is either nothing to interpret, or the interpretation is contrary to statute – in which case the interpretation is invalid.

deliberation on the part of Congress. In part, this relates to the constitutional significance of the decision to delegate such powers. More pragmatically, the transfer of power to act with the force of law is serious business and is not something taken lightly by either the constitutional branches of government or the citizens who will be affected by such a transfer of power. By insisting that agencies be given the power to act with the force of law before their interpretations are entitled to mandatory deference, we thus ensure that such delegations are confined to circumstances in which Congress has made a considered judgment to confer an especially notable type of power – the power to act in a sovereign capacity – on the agency.

Finally, asking whether the agency has authority to act with the force of law generates outcomes that coincide with judicial intuitions about what sorts of agencies are entitled to *Chevron* deference. All courts agree that agencies that have general grants of legislative rulemaking authority are entitled to *Chevron* deference, and most courts have concluded that agencies that have authority to render binding adjudications are entitled to *Chevron* deference. *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (interpretation adopted by Board of Immigration Appeals in adjudication entitled to *Chevron* deference); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992) (interpretation reflected in order of Interstate Commerce Commission entitled to *Chevron* deference).

On the other hand, courts have "never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring). If we look to the policy justifications for deference – such as drawing upon agency expertise and assuring uniformity in interpretation of

law – this intuition makes little sense.[13] But once it is recognized that *Chevron* deference is based on a congressional delegation of authority to act with the force of law, the exclusion of prosecutorial agencies is readily explainable. Prosecutors interpret the law, but their interpretations lack binding force on persons outside the agency. Thus, prosecutors do not satisfy the basic precondition for the exercise of *Chevron* deference.

What then are the powers that Congress must confer upon an agency in order to make it eligible for *Chevron* deference? Basically, Congress must give an agency the power either to promulgate legislative rules or to render self-executing adjudicatory orders. In both contexts, the agency has been charged with authority to act with the force of law on persons outside the agency without regard to the intervention of any other governmental actor.

B. Agency Interpretations Having the Force of Law.

Having determined which agencies are entitled to *Chevron* deference, the next step is to establish what kinds of agency interpretations fall within the scope of this power. In his *Christensen* concurrence, Justice Scalia argued that any agency interpretation is entitled to *Chevron* deference as long as it is "authoritative." *Christensen*, 120 S. Ct. at 1664. He suggested that an authoritative interpretation is one that "represent[s] the official position of the expert agency." *Id.* at 1664 n.*. Justice Breyer's dissent appeared to agree with this suggestion. *Id.* at 1667.

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[13] *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 489-92 (1996) (urging the extension of *Chevron* deference to interpretations of federal criminal law by federal prosecutors, but acknowledging that this is contrary to existing judicial authority).

Affording *Chevron* deference to any "authoritative" interpretation, however, de-couples the scope of *Chevron* deference from the act of Congress that gives rise to the implication of delegated interpretative authority in the first place. Under Justice Scalia's suggested approach, once we determine that an agency is entitled to *Chevron* deference, for example because it has been given the power to promulgate legislative rules, it does not matter whether the agency issues its interpretation in a legislative rule. It can just as easily announce the interpretation in an interpretative rule, a policy manual, a press conference held by the agency head, or a brief filed in court.

This sweeping conception of the scope of *Chevron* authority, however, is not faithful to the logic of the *Chevron* doctrine, which rests on an implied delegation from Congress. Delegations of power to bind persons outside the agency with the force of law are strictly limited in accordance with their terms: "The grant of such a power is never to be implied." *ICC v. Cincinnati, N.O. & Tex. Pac. Rwy.*, 167 U.S. 479, 494 (1897). This understanding follows both from the nondelegation doctrine, with its requirement that every delegation be express and be constrained by an intelligible principle, *see J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), as well as from the APA's prohibition on agencies exercising governmental power "except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). Given that the primary grant of power to bind persons with the force of law cannot be expanded beyond its express terms, it follows that the derivative grant – the implied power to exercise interpretational authority – should also not be subject to expansion beyond the terms of the grant. Consequently, unless Congress has expressly directed to the contrary, *Chevron*

deference should be limited to legislative rules and adjudications that result in binding and self-executing orders.[14]

This is admittedly a more restrictive view of the scope of *Chevron* deference than is implicit in some of the Court's decisions. The Court has in a handful of cases suggested that agency action more informal than notice-and-comment rulemaking or formal adjudication may be entitled to *Chevron* deference.[15] But in none of these decisions has the Court explained how, consistent with the underlying logic of delegation, an agency should be entitled to mandatory deference when it interprets a statute in a procedural format that does not otherwise have the force of law.

Limiting the derivative grant of power to interpret to the same scope as the primary grant to bind with force of law makes sense because the two powers are functionally equivalent. Giving an agency the power to promulgate legislative rules (or to render formal adjudications), subject to judicial review to assure that the rule (or order) does not violate the statute and is not arbitrary, capricious or an abuse of

[14] This is essentially the position adopted by the Administrative Conference of the United States in 1989. *See* Administrative Conference of the United States, *Recommendation 89-5: Achieving Judicial Acceptance of Agency Statutory Interpretations*, RECOMMENDATIONS AND REPORTS 31-33 (1989). For a revised version of the report accompanying the recommendation, see Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990).

[15] *See Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 255-57 (1995) (letter of Comptroller of Currency); *Pension Benefit Guaranty Corp. v. The LTV Corp.*, 496 U.S. 633, 647-48 (1990) (informal adjudication); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 574 (1988) (NLRB adjudication); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 978-79 (1986) (no action decision of Food and Drug Administration).

discretion, *see* 5 U.S.C. § 706(2)(A), has no greater impact on regulated parties than giving the agency the power to interpret the statute, subject to judicial review to assure that the interpretation does not violate the statute and is "reasonable" or "permissible." *See Chevron*, 467 U.S. at 843-44; Duffy, *supra* note 4, at 199-203. And even if there is some gossamer distinction between the APA's arbitrary and capricious standard and *Chevron*'s step two standard – and there is little or no authority that would support such a distinction – the *effect* of judicial approval is the same in both cases: the agency's policy must be accepted and becomes binding on parties outside the agency.

The conclusion that *Chevron* deference extends only to those interpretations that reflect the exercise of an express grant of power to act with the force of law is reinforced by powerful process arguments. First, confining the scope of *Chevron* deference to legislative rules and formal adjudications preserves the right of public participation in the development of administrative interpretations of statutes. Both legislative rulemaking and formal adjudication are subject to procedural rules that ensure a significant degree of public participation before an agency may take final action. *See Christensen*, 120 S. Ct. at 1662 (recognizing this point).

With respect to legislative rules, agencies must, subject to certain exceptions,[16] comply with the notice-and-comment provisions of Section 553 of the APA (5 U.S.C. § 553). As interpreted by the courts, these provisions require public notice of a proposed agency interpretation, an opportunity to file

[16] Procedural rules are exempt from the notice-and-comment requirements, as are substantive rules if the agency finds for good cause that notice-and-comment would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(A), (B).

written comments on the interpretation, and a reasoned response by the agency to any comments that raise material concerns. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49, 56-57 (1983). Public input is thus ensured, and the agency must be responsive to that input in order to avoid a judicial remand.

Similarly, formal adjudications must comply with the hearing requirements of Section 556 and 557 of the APA (5 U.S.C. §§ 556, 557), and all adjudications that affect liberty or property interests must afford a hearing that comports with due process requirements. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). These procedural requirements mean that the parties immediately affected will have an opportunity to submit some kind of brief addressing a proposed agency interpretation. Given the adversarial structure of adjudication, it will be incumbent on the agency staff to respond to criticisms that are material. And judicially-developed norms of reasoned decisionmaking compel the decision maker to provide an explanation for the agency's resolution of the issue. Again, public input is ensured, and the agency has a substantial incentive to be responsive to that input.

In contrast, other modes of announcing agency interpretations do not offer equivalent guarantees of public participation. Interpretative rules and policy statements are specifically exempt from the notice-and-comment requirements of Section 553. *See* 5 U.S.C. § 553(b)(A). Policy manuals and enforcement guidelines are similarly assumed to fall within these exemptions. Opinion letters, no action letters, and the like do not provide the same structured opportunities for participation as does formal adjudication. And of course agency press conferences, speeches by agency executives, and appellate briefs or *amicus* briefs filed in the agency's name

typically offer no established forum for public input before they are released.

Confining the scope of *Chevron* deference to legislative rulemaking and formal adjudication thus provides important assurance that interpretations entitled to mandatory deference will be open to public criticism before they are rendered, and that agencies will have incentives to be responsive to these criticisms. This correspondence between delegations to act with the force of law and the existence of rights of public participation is not, of course, accidental. General norms of democratic governance and traditions of due process both stress the importance of affording affected persons the right to be heard before they are subjected to the coercive power of the state.[17] Hence it is not surprising that the provisions of the APA, supplemented by due process considerations, afford rights of public participation when agencies are given the power to bind persons with the force of law. Limiting the scope of *Chevron* deference to interpretations rendered in legislative rules and formal adjudications preserves this important equation between the exercise of coercive governmental power and the right to be heard.

A second process concern is the danger of evasion of the procedural protections of the APA if *Chevron* deference is extended beyond legislative rules and formal adjudications. Agencies are often frustrated by the time and resources required to comply with notice-and-comment hearing procedures and the rules of formal adjudication. Yet the APA and due process law demand compliance with these procedures before agencies can take action that binds the public with the force of law. *See Chrysler Corp.*, 441 U.S. at 303.

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[17] *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760-90 (1975).

Expanding the scope of the *Chevron* doctrine to include interpretations rendered in informal formats creates an avenue for evasion of these requirements. As noted above, a *Chevron*-certified interpretation has the same effect on the regulated community as a judicially-sustained legislative rule. The only difference is that the agency has been able to achieve this effect without going through the cumbersome notice-and-comment procedures associated with legislative rulemaking (or the procedures associated with formal adjudication). One can of course question whether the costs associated with notice-and-comment rulemaking and formal adjudication are too high given limited agency resources. But sanctioning an evasion of Sections 553 or 556 and 557 via an expanded *Chevron* doctrine is not the proper solution. If the current procedural matrix is too elaborate, then it should be relaxed across the board, or modified in accordance with some criterion that more sensibly rations scarce agency resources. The strategy of evading these requirements via an expanded *Chevron* results in complete elimination of procedural protections on a hit-or-miss basis, corresponding to no coherent design.

III. A CUSTOMS SERVICE TARIFF CLARIFICATION RULING IS ENTITLED TO *SKIDMORE* DEFERENCE, NOT *CHEVRON* DEFERENCE.

Under the foregoing principles, tariff clarification rulings issued by the Customs Service are not entitled to *Chevron* deference. Instead, these rulings should be given such weight as is appropriate under the multi-factoral analysis prescribed by *Skidmore*.

There is no doubt that the Customs Service is an agency that is entitled, in appropriate circumstances, to *Chevron* deference. Congress has delegated general authority to the Secretary of

Treasury "to issue such rules and regulations as may be necessary to carry out the provisions of this chapter." 19 U.S.C. § 1624; *see also* General Note 20 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202. The clarification of ambiguities and gaps in the tariff statutes by means of legislative regulations adopted pursuant to these delegated powers is entitled to *Chevron* deference, as this Court held in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999).

A separate provision of the tariff statutes authorizes the Secretary of Treasury to issue regulations establishing procedures for the issuance of tariff classification rulings. 19 U.S.C. §1502(a). It is possible that this statute also represents the kind of delegation of power to act with the force of law that would give rise to *Chevron* deference. The statute gives the Secretary of Treasury power to "establish and promulgate such rules and regulations not inconsistent with law" including "regulations establishing procedures for the issuance of *binding rulings* prior to the entry of the merchandise concerned." *Id.* (emphasis added). This language is broad enough to sustain the promulgation of legislative regulations or the rendering of binding adjudications establishing the appropriate classification of particular merchandise prior to entry.

However, the Customs Service has not drawn upon this grant of authority to issue legislative rules or to render binding adjudications. Pursuant to the authority granted by 19 U.S.C. § 1502(a), the Secretary has issued regulations that provide for the issuance of "ruling letters." 19 C.F.R. § 177.9(a). The regulations describe the legal effect of these ruling letters as follows:

> A ruling letter issued by the Customs Service under the provisions of this part represents the

> official position of the Customs Service with respect to the particular transaction or issue described therein and is *binding on all Customs Service personnel* in accordance with the provisions of this section until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances.

Id. (emphasis added). The regulation specifies that such rulings are "binding on all Customs Service personnel." But it does not suggest that these rulings bind private parties or courts.

It appears, therefore, that tariff classification rulings do not bind the world with the force of law the way a legislative rule does. They are binding only on agency personnel, which is characteristic of interpretative rules. Moreover, the rulings are not adopted pursuant to the notice-and-comment provisions of Section 553 of the APA, *see* Pet. App. 6a-7a, which is ordinarily a prerequisite for a valid legislative rule. Lacking the critical features of a binding legislative rule, tariff classification rulings are thus not entitled to *Chevron* deference.[18]

[18] The basis for distinguishing between legislative rules and interpretative rules has been a matter of considerable uncertainty in the lower courts. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000). One distinction is that a legislative rule articulates a new legal norm, whereas an interpretative rule interprets an existing norm. This is evidently the distinction Justice Scalia had in mind in when he observed in *Christensen* that the rule in *Chevron* (defining the statutory term "stationary source") "in fact involved an interpretative regulation." *Christensen*, 120 S. Ct. at 1664 (Scalia, J., concurring). For purposes of deciding what kinds of agency interpretations are entitled to mandatory deference, however, two other distinguishing traits are more germane: whether the rule binds persons outside the agency with force of law, and whether the rule was adopted in accordance with the procedural requirements of the APA. *See* Pierce, *supra*, at 549-554. On both scores, the regulation in *Chevron* was legislative and hence was entitled to mandatory deference; conversely, tariff classification rulings should be categorized as interpretative, and hence are not entitled to *Chevron* deference.

It does not follow, of course, that tariff classification rulings are entitled to no deference whatever. Those rulings represent the considered view of the agency that has the greatest expertise in harmonizing the different provisions of the tariff schedules. It is especially significant that the regulations specify that tariff classification rulings may be cited as precedents "in the disposition of transactions involving the same circumstances." 19 C.F.R. § 177.9(a). *Skidmore* deference, with its emphasis on the thoroughness, consistency, and the degree of reliance associated with executive interpretations, is especially well suited to a regime that expressly treats agency interpretative rulings as precedents in similar cases.[19]

In this regard, tariff classification rulings bear a substantial resemblance to revenue rulings issued by the Internal Revenue Service. As this Court has held, revenue rulings "do not have the force and effect of regulations." *Davis v. United States*, 495 U.S. 472, 484 (1990). Revenue rulings are nevertheless entitled to "considerable weight," especially when "they involve the contemporaneous construction" of the statute or when they "have been in long use." *Id.*; *see also Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (applying similar analysis to Treasury ruling interpreting the Tariff Act). This is the type of deference mandated by *Skidmore*.

[19] *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1472-73 (1992) (noting that interpretative rules are often treated like precedents).

In short, although the Federal Circuit was correct that tariff classifications are not entitled to *Chevron* deference, it erred in jumping to the conclusion that this meant the court was free to impose its own view of the meaning of the tariff schedules. The interpretations of the schedules reflected in the tariff classification rulings were deserving of the most respectful consideration under *Skidmore*.

Amicus takes no position on how much weight the Customs Service's tariff classification rulings in this case should be given under the *Skidmore* factors. Because the possibility of applying *Skidmore* deference appears not to have been raised sharply in the court below, see Pet. Reply Br. at 4-6, this Court may wish to consider remanding to the Federal Circuit to undertake this inquiry in the first instance.

CONCLUSION

The decision of the court of appeals should be vacated.

Respectfully submitted,

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